



Republic of the Philippines
Supreme Court
Manila

EN BANC

G.R. No. 207246 - JOSE M. ROY III v. CHAIRPERSON TERESITA J. HERBOSA, THE SECURITIES AND EXCHANGE COMMISSION, PHILIPPINE LONG DISTANCE TELEPHONE COMPANY, AND THE PHILIPPINE STOCK EXCHANGE

X- ----- X

WILSON C. GAMBOA, JR., DANIEL V. CARTAGENA, JOHN WARREN P. GABINETE, ANTONIO V. PESINA, JR., MODESTO MARTIN Y. MANON III, and GERARDO C. EREBAREN, *Petitioners-in-intervention*

X ----- X

PHILIPPINE STOCK EXCHANGE, INC., *Respondents-in Intervention*

X ----- X

SHAREHOLDERS' ASSOCIATION OF THE PHILIPPINES, INC., *Respondents-in Intervention*

X ----- X

Promulgated:

DISSENTING OPINION November 22, 2016

MENDOZA, J.:

The final ruling in a case includes not only the decision but also the clarifications and amplifications contained in subsequent resolutions before its finality. A party cannot isolate the decision and ignore the elucidations contained in the resolutions. It is only after the decision becomes final that it becomes immutable and unalterable.¹

Accordingly, the June 28, 2011 Decision in *Gamboa v. Teves*² (*Gamboa Decision*) is not the final ruling in said case but includes the clarification and amplifications of the Court in its October 9, 2012

¹ Under the doctrine of finality of judgment or immutability of judgment, a decision that has acquired finality becomes immutable and unalterable, and may no longer be modified in any respect, even if the modification is meant to correct erroneous conclusions of fact and law, and whether it be made by the court that rendered it or by the Highest Court of the land. (*Gomeco Metal Corp. v. Court of Appeals*, G.R. No. 202531, August 17, 2016.

² 668 Phil. 1 (2011) (Decision)

Resolution (*Gamboa Resolution*). Therefore, any regulation which ignores the Court's final ruling is not compliant with it. Hence,

I dissent.

My position is that SEC MC No. 8 is non-compliant with the final Gamboa ruling and must be amended to conform thereto.

The Antecedents

The case of *Gamboa* was filed by the late Wilson Gamboa, questioning the sale of 111,415 shares of Philippine Telecommunications Investment Corporation (*PITC*) to First Pacific, a foreign corporation, as it was violative of Section 11, Article XII of the Constitution.³ It was averred therein that PITC owned 6.3% of the Philippine Long Distance Telephone Company (*PLDT*), a public utility enterprise, and the acquisition by First Pacific of its entire shareholding would amount to the foreign ownership of the 6.3% common shares of PLDT. This would effectively increase the foreign ownership of common shares in PLDT to 81.47%.

On June 28, 2011, the Court rendered the Gamboa Decision, holding that for there to be compliance with the constitutional mandate, full beneficial ownership over sixty-percent (60%) of the total outstanding capital stock, coupled by sixty-percent (60%) control over shares with the right to vote in the election of directors, must be held by Filipinos. Thus, the decretal portion of the *Gamboa Decision* reads:

WHEREFORE, we **PARTLY GRANT** the petition and rule that the term "capital" in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is **DIRECTED** to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there is a violation of Section

³ **Section 11.** No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

11, Article XII of the Constitution, to impose the appropriate sanctions under the law.⁴

Thereafter, motions for reconsideration were filed. In its Resolution,⁵ dated October 9, 2012 (*Gamboa Resolution*), the Court stressed that the 60-40 ownership requirement in favor of Filipino citizens in the Constitution to engage in certain economic activities applied **not only to voting control, but also to the beneficial ownership** of the corporation. The Court wrote that the same limits **must apply uniformly and separately to each class of shares, without regard to their restrictions or privileges**. Specifically, the Court explained:

Since a specific class of shares may have rights and privileges or restrictions different from the rest of the shares in a corporation, the 60-40 ownership requirement in favor of Filipino citizens in Section 11, Article XII of the Constitution must **apply not only to shares with voting rights but also to shares without voting rights**. Preferred shares, denied the right to vote in the election of directors, are anyway still entitled to vote on the eight specific corporate matters mentioned above. Thus, if a corporation, engaged in a partially nationalized industry, issues a mixture of common and preferred non-voting shares, at least 60 percent of the common shares and at least 60 percent of the preferred non-voting shares must be owned by Filipinos. Of course, if a corporation issues only a single class of shares, at least 60 percent of such shares must necessarily be owned by Filipinos. In short, **the 60-40 ownership requirement in favor of Filipino citizens must apply separately to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares**. This uniform application of the 60-40 ownership requirement in favor of Filipino citizens clearly breathes life to the constitutional command that the ownership and operation of public utilities shall be reserved exclusively to corporations at least 60 percent of whose capital is Filipino-owned. Applying uniformly the 60-40 ownership requirement in favor of Filipino citizens to each class of shares, regardless of differences in voting rights, privileges and restrictions, guarantees effective Filipino control of public utilities, as mandated by the Constitution. [Emphases supplied]

Hence, the Court finally decreed:

WHEREFORE, we **DENY** the motions for reconsideration **WITH FINALITY**. No further pleadings shall be entertained.

SO ORDERED.⁶

⁴ Decision, *supra* note 2.

⁵ Resolution, G.R. No. 176579, October 9, 2012. (<http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>) (Last visited, April 21, 2015).

⁶ Resolution, G.R. No. 176579, October 9, 2012. (<http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>) (Last visited, April 21, 2015).

Eventually, the definition of “capital,” as finally amplified and elucidated by the Court in the *Gamboa Resolution*, became final and executory.

On March 25, 2013, the SEC issued a notice to the public, soliciting comments on, and suggestions to, the draft guidelines in compliance with the Filipino ownership requirement in public utilities prescribed in Section 11, Article XII of the Constitution.

On April 22, 2013, petitioner Atty. Jose M. Roy III (*Roy*) submitted his written comments⁷ pursuant to the SEC Notice of March 25, 2013. He pointed out that the said guidelines (specifically Section 2 thereof) did not comply with the letter and spirit of the Court’s final ruling in *Gamboa*. Roy claimed that he never received a reply from the SEC.

On May 20, 2013, the SEC, through Chairperson Teresita J. Herbosa, issued MC No. 8. Section 2 thereof reads:

Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino shall be applied to **BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.**⁸ [Emphasis supplied]

The Subject Petition

Contending that the issuance of the assailed circular contradicted the intent and spirit of *Gamboa*, Roy, as a lawyer and taxpayer, filed the subject petition, contending that the assailed circular contradicted the intent and spirit of the final *Gamboa* ruling. He feared that the assailed circular would encourage circumvention of the constitutional limitation for it would allow the creation of several classes of voting shares with different degrees of beneficial ownership over the same, but at the same time, not imposing a forty percent (40%) limit on foreign ownership of the higher yielding stocks; and that permitting foreigners to benefit from equity structures with Filipinos being given merely voting rights, but not the full economic benefits, thwarts the constitutional directive of guaranteeing a self-reliant

⁷ *Rollo*, pp. 270-272.

⁸ <<https://sec.gov.ph/.../memorandumcircular/.../sec%20memo%20no.%208>> (Last visited, April 21, 2015).

and independent national economy effectively controlled by Filipinos. The effect would be, as he wrote, that while Filipinos are given voting rights, they would be denied of the full economic benefits produced by the public utility company.

Petition-in-Intervention

Following the filing of the said petition by Roy, the Court granted the Motion to Leave to File Petition-in-Intervention filed by Wilson C. Gamboa, Jr., the son of the petitioner in *Gamboa*, together with lawyers Daniel V. Cartagena, John Warren P. Gabinete, Antonio V. Pesina, Jr., Modesto Martin Y. Manon, and Gerardo C. Erebaren (*Gamboa, et al.*). In their Petition-in-Intervention (For Certiorari),⁹ dated July 16, 2013, Gamboa, et al. merely adopted the issues, arguments and prayer of Roy.

Both Roy and Gamboa, et al. (*petitioners*) claimed that by issuing MC No. 8, the SEC defied the final *Gamboa* ruling as to the determination of foreign ownership in a public utility corporation. They argued that MC No. 8 did not conform to the letter and spirit of the final Court ruling as the *Gamboa Resolution* clearly stated that the 60-40 ownership requirement must apply separately to each class of shares. MC No. 8, they asserted, failed “to make a distinction between different claims of shares, and instead offers only a general distinction between voting and all other shares.”¹⁰ They further pointed out that, as an effect of this faulty interpretation by the SEC, PLDT would be in direct violation of the Constitution as it did not comply with the 60-40 rule and, therefore, could not be considered a Filipino corporation.

Respondents' Position

The SEC, in its Consolidated Comment,¹¹ dated September 13, 2013, and PLDT, in its Comment (on the Petition dated 10 June 2013),¹² dated September 5, 2013, and Comment (on The Petition-in-Intervention, dated July 16, 2013)¹³ submitted basically the same arguments to support their prayer for the dismissal of the petition and the petition-in-intervention. They both questioned the jurisdiction of the Court over the petitions and invoked the doctrine of hierarchy of courts to show that direct resort to this Court by the petitioners could not be justified, and that they failed to exhaust administrative remedies. The SEC and PLDT also agreed that the petitioners did not possess the *locus standi* to question the constitutionality of MC No.

⁹ *Rollo*, pp. 231-263.

¹⁰ *Id.* at 11.

¹¹ *Id.* at 544-584.

¹² *Id.* at 466-524.

¹³ *Id.* at 633-653.

8, and that they could not invoke “transcendental importance” as a protective cloak. With regard to PLDT’s compliance with the foreign ownership requirement laid down in *Gamboa*, the SEC and PLDT both argued that this requires the determination of facts, in effect, categorizing the petitions premature and improper.

The SEC also pointed out that the tenor of the decretal portion of the decision of the Court in *Gamboa*, as well as that of its October 9, 2012 resolution, was that the term capital should pertain to shares of stocks entitled to vote in the election of directors, and that there was nothing in there that mentioned about the 60-40 ownership requirement for each class of shares. It also argued that the omitted rule was a mere *obiter dictum* or one without any binding precedent. The SEC emphasized that the *fallos* of the said decision and resolution must control.

Petitioners’ Reply

On May 7, 2014, the petitioners filed their Joint Consolidated Reply with Motion for Issuance of Temporary Restraining Order¹⁴ wherein they insisted that the Court had already determined the transcendental importance of the matters being raised, citing the rule that where there was already a finding that a case possessed transcendental importance, the *locus standi* requirement should be relaxed.

On May 22, 2014, PLDT filed its Rejoinder and Opposition.

Comment in Intervention by Philippine Stock Exchange

On June 18, 2014, the Philippine Stocks Exchange, Inc. (*PSEI*) filed its Motion to Intervene with Leave of Court¹⁵ attaching thereto its Comment-in-Intervention. The *PSEI* took the same position as the SEC as to how capital in Section 11, Article XII of the 1987 Constitution was defined in *Gamboa*. It agreed with the SEC that the dispositive portion or the *fallo* of a decision should be the controlling factor.

Comment in Intervention by Sharephil

On June 1, 2016, Shareholders’ Association of the Philippines, Inc. (*Sharephil*) filed an Omnibus Motion for Leave to Intervene and Admit attached Comment-in-Intervention. It sought intervention under Rule 19 of

¹⁴ Id. at 723-756.

¹⁵ Id. at 839-847.

the Rules of Court¹⁶ to protect the rights of shareholders against the effects of unlawful and unreasonable regulations.

As an association composed of shareholders of Philippine companies, Sharephil questions the propriety of the remedy availed of by the petitioners. It asserts that the proper remedy should have been a petition for declaratory relief, which is well within the jurisdiction of the Regional Trial Courts.¹⁷

On the merits, Sharephil rejects petitioners' contention that MC No. 8 deviated from the ruling of this Court in *Gamboa*. It argues that the SEC, in issuing the assailed circular, merely followed what the Court stated in the dispositive portion of the *Gamboa* Resolution¹⁸ affirming the *Gamboa* Decision.¹⁹

On practical considerations, Sharephil seeks to bring to the attention of the Court the effects of declaring MC No. 8 as unconstitutional. It cites a market research study released by Deutsche Bank on October 16, 2012 which opined that if the Court would adopt an overly strict interpretation of the meaning of capital, not only PLDT but also a large number of listed companies with similar structures could also be affected. It cautions that in five (5) companies alone, 150 billion pesos worth of shares would have to be sold by foreign shareholders in a forced divestment, if the *obiter* in *Gamboa* were to be implemented.

Petitioners' Reply to the Comment-in-Intervention

In their Opposition and Reply to Intervention of Philippine Stock Exchange and Sharephil,²⁰ petitioners essentially argue that PSE and Sharephil have no legal standing to intervene. They submit that both intervenors have failed to establish sufficient legal interest in the petition; that while it is true that intervention is permissive, it should not be so lax as

¹⁶ **Section 1. Who may intervene.** — A person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof may, with leave of court, be allowed to intervene in the action. The court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding. (2[a], [b]a, R12)

Section 2. Time to intervene. — The motion to intervene may be filed at any time before rendition of judgment by the trial court. A copy of the pleading-in-intervention shall be attached to the motion and served on the original parties. (n)

Section 3. Pleadings-in-intervention. — The intervenor shall file a complaint-in-intervention if he asserts a claim against either or all of the original parties, or an answer-in-intervention if he unites with the defending party in resisting a claim against the latter. (2[c]a, R12)

Section 4. Answer to complaint-in-intervention. — The answer to the complaint-in-intervention shall be filed within fifteen (15) days from notice of the order admitting the same, unless a different period is fixed by the court.

¹⁷ *Galicto v. Aquino*, 683 Phil. 141 (2012).

¹⁸ Resolution, 696 Phil. 276 (2012).

¹⁹ Decision, 668 Phil. 1 (2011).

²⁰ *Rollo*

to admit of any whimsical or a mere passing interest in the issues at hand; that in the instances where interventions were allowed by this Court, the most cited reason was that the parties seeking intervention were indispensable in the case; and that in this case, PSEI and Sharephil are not indispensable parties as they will not sustain direct injury capable or deserving judicial protection.

Moreover, petitioners assert that Sharephil's claims were broad and speculative as they were based solely on a perceived inconvenience that would be brought by this proceedings to their members; and that there was no showing of any direct injury or damage on the part of Sharephil considering that it is not involved in a constitutionally restricted economic activity.

As to the claim that a ruling in favor of the petitioners will result in an injury to PSE by reason of a sudden selling of shares in the market, they point out that the depreciation and fluctuation of the market and share prices are not an injury capable of legal protection in a proceeding involving the interpretation of the Constitution. At any rate, such movement in prices is normal.

Finally, in upholding the correct interpretation and implementation of the Constitution, the Philippines commits no breach against other states or their nationals under international law particularly in cases where no general or particular specific obligations limiting judicial interpretation of municipal law exists.

ISSUES

1. **WHETHER OR NOT SEC MEMORANDUM CIRCULAR NO. 8, SERIES OF 2013 CONFORMS TO THE LETTER AND SPIRIT OF THE DECISION AND RESOLUTION OF THIS HONORABLE COURT DATED 28 JUNE 2011 AND 9 OCTOBER 2012 IN G.R. NO. 176579 ENTITLED HEIRS OF WILSON GAMBOA v. FINANCE SECRETARY MARGARITO B. TEVES, ET AL.**
2. **WHETHER THE SEC GRAVELY ABUSED ITS DISCRETION IN RULING THAT PLDT IS COMPLIANT WITH THE CONSTITUTIONAL RULE ON FOREIGN OWNERSHIP.**
 - A. **THE PLDT BENEFICIAL TRUST FUND DOES NOT SATISFY THE EFFECTIVE CONTROL TEST FOR PURPOSES OF INCORPORATING BTF HOLDINGS WHICH ACQUIRED THE 150 MILLION PREFERRED VOTING SHARES OF PLDT.**
 - B. **WHETHER PLDT, THROUGH ITS ALTER-EGOS MEDIAQUEST AND BTF HOLDINGS, INC., IS CIRCUMVENTING THE FOREIGN OWNERSHIP**

**RESTRICTIONS PROVIDED FOR IN THE 1987
CONSTITUTION.**

**3. WHETHER RECOURSE TO THIS HONORABLE COURT IS
JUSTIFIED BY THE TRANSCENDENTAL IMPORTANCE OF
THE ISSUE RAISED BY THE PETITIONER.²¹**

A reading of the contending pleadings discloses that the issues primarily raised are (1) whether the SEC gravely abused its discretion when it omitted in SEC MC No. 8 the uniform and separate application of the 60:40 rule in favor of Filipinos to each and every class of shares of a corporation; and (2) whether the constitutional prescription has been complied with in the case of PLDT.

Considering that this Court is not a trier of facts, questions pertaining to whether there was violation of the constitutional limits on foreign ownership by PLDT requires the reception and examination of evidence. As this is beyond the Court's jurisdiction, it will just confine itself to the first question.

Procedural Issues

Propriety of the Remedy

The SEC and PLDT raise two procedural issues that should bar the assumption of jurisdiction by this Court.

According to the SEC, a Rule 65 petition is not the appropriate remedy to assail the validity and constitutionality of MC No. 8. It posits that it may be invoked only against a tribunal, board or officer exercising judicial or quasi-judicial functions. Considering that the assailed circular was not issued in the exercise of quasi-judicial functions and was more of a quasi-legislative act, the SEC opines that the filing of a Rule 65 petition is not proper. Citing *Southern Hemisphere Engagement Network, Inc., v. Anti-Terrorism Council*,²² where the Court dismissed the petition for *certiorari* and prohibition assailing the constitutionality of Republic Act (R.A.) No. 9372 and Executive Order (E.O.) No. 7 for being an improper remedy as the said issuances did not involve a quasi-judicial or judicial act, the SEC argues that the appropriate remedy should have been a petition for declaratory relief under Rule 63 of the Rules of Court filed before a regional trial court.²³

²¹ *Rollo*, Volume I, pp. 10-11.

²² 646 Phil. 452 (2010).

²³ *Rollo*, Volume. II, pp. 564-566.

I cannot entirely agree.

Ordinarily, the remedies of special civil actions for *certiorari* and prohibition are used in cases where the inferior court or tribunal is said to be exceeding its jurisdiction or was not proceeding according to essential requirements of law and would lie only to review judicial or quasi-judicial acts.²⁴ Still, with the constitutionally expanded powers of judicial review, particularly the authority and duty to determine the existence of grave abuse of discretion on the part of the legislative and executive branches of government, it cannot be denied that the scope of the said remedies, as traditionally known, has changed.

The special civil actions for *certiorari* and prohibition under Rule 65 have been held by this Court as proper remedies through which the question of grave abuse of discretion can be heard regardless of how the assailed act has been exercised. In *Araullo v. Aquino*,²⁵ this Court stated that “the remedies of *certiorari* and prohibition are necessarily broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, **even if the latter does not exercise judicial, quasi-judicial or ministerial functions.**” It was further stated that in discharging the duty “to set right and undo any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, the Court is not at all precluded from making the inquiry provided the challenge was properly brought by interested or affected parties.”²⁶

Hence, petitions for *certiorari*, as in this case, and prohibition are undeniably appropriate remedies to raise constitutional issues and to review and/or prohibit or nullify the acts of legislative and executive officials.

As to PLDT’s position that a petition for declaratory relief should have been the appropriate remedy, I find it to be without basis.

An action for declaratory relief presupposes that there has been no actual breach of the instruments involved or of the rights arising thereunder. It gives a practical remedy to end controversies that have not reached the state where another relief is immediately available; and supplies the need for a form of action that will set controversies at rest before they lead to a repudiation of obligations, an invasion of rights, and a commission of

²⁴ *People v. Sandiganbayan*, G.R. No. 188165, December 11, 2013, 712 SCRA 359.

²⁵ G.R. No. 209287, July 1, 2014, 728 SCRA 1.

²⁶ *Id.*

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wrongs. The purpose of an action for declaratory relief is to secure an authoritative statement of the rights and obligations of the parties under a statute, deed, or contract for their guidance in the enforcement thereof, or compliance therewith, and not to settle issues arising from an alleged breach thereof, it may be entertained before the breach or violation of the statute, deed or contract to which it refers.²⁷

In this case, declaratory relief can no longer be availed of because the mere issuance of MC No. 8 is being viewed by the petitioners as a violation by itself of the Constitution and this Court's final directive in *Gamboa*. As it appears, the purpose of this petition is not to determine rights or obligations under the assailed circular for enforcement purposes, but to settle the very question on whether the issuance was made within the bounds of the Constitution which, if otherwise, would certainly amount to grave abuse of discretion. By that standard alone, a petition for declaratory relief clearly would not lie.

Hierarchy of Courts

The SEC and PLDT also contend that the Court should not assume jurisdiction over this case because the petitioners failed to observe the principle of hierarchy of courts. Under that principle, direct recourse to this Court is improper because the Court must remain the court of last resort to satisfactorily perform its constitutional functions. It allows the Court to devote its time and attention to matters within its exclusive jurisdiction and to prevent the overcrowding of its docket. Be that as it may, the invocation of this Court's original jurisdiction or plea for the dispensation of recourse to inferior courts having concurrent jurisdiction to issue writs of *certiorari* has been allowed in certain instances for special and important reasons clearly stated in the petition, such as, (1) when dictated by the public welfare and the advancement of public policy; (2) when demanded by the broader interest of justice; (3) when the challenged orders were patent nullities; or (4) when analogous exceptional and compelling circumstances called for and justified the immediate and direct handling of the case.²⁸

Exigent and compelling circumstances demand that this Court take cognizance of this case to put an end to the controversy and resolve the matter that could have pervasive effect on this nation's economy and security. Surely, this case is a litmus test for a regulatory framework that must conform to the final *Gamboa* ruling and, above all, the Constitution. Not to be disregarded is the opportunity that this case seeks to clarify the dynamics of how to properly apply the nationality limits on public utilities. As Roy puts it, the fact that this case relates to, and involves, an interpretation of the final *Gamboa* ruling, makes it more necessary to

²⁷ *Malana v. Tappa*, 616 Phil. 177 (2009).

²⁸ *Dy v. Judge Bibat-Palamos*, G.R. No. 196200, September 11, 2013, 705 SCRA 613.

immediately and finally settle the issues being raised. This provides the Court an adequate and compelling reason to justify direct recourse to this Court.

Justiciability of the Controversy

The Court's authority to take cognizance of the kind of questions presented in this case is not absolute. The Constitution prescribes that before the Court accepts a challenge to a governmental act, there must be first an actual case or controversy. In the words of the US Supreme Court, this is an "essential limit on our power [as] [i]t ensures that we act as judges, and do not engage in policymaking properly left to elected representatives."²⁹ For if the Court would rule in all cases despite lacking the requirement of an actual case, the Court might tread on forbidden grounds or matters on which it had no constitutional competence, these matters being reserved to a more appropriate branch of government pursuant to the established principle of separation of powers.

As ingrained in our jurisprudence, an actual case is one that is appropriate or ripe for determination, not conjectural or anticipatory.³⁰ "[C]ourts do not sit to adjudicate mere academic questions to satisfy scholarly interest, however intellectually challenging."³¹ It has been said that any attempt at abstraction could only lead to dialectics and barren legal questions and to sterile conclusions unrelated to actualities.³² For said reasons, courts have no business issuing advisory opinions.

Traditionally, a justiciable controversy must involve countervailing interests pertaining to enforceable and demandable rights of adverse parties. But with the constitutionally granted expansion of the power of judicial review brought about to reflect the people's desire to have a proactive Judiciary that is ever vigilant with its duty to maintain the supremacy of the Constitution,³³ justiciable questions took an expanded form. As held in *Imbong v. Ochoa*,³⁴ the Judiciary would now have the constitutional authority to determine whether there had been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.³⁵

²⁹ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (U.S. 2013).

³⁰ *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 646 Phil. 452, 479 (2010) [Per J. Carpio Morales, En Banc], citing *Republic Telecommunications Holding, Inc. v. Santiago*, 556 Phil. 83, 91–92 (2007).

³¹ *Abdul v. Sandiganbayan*, G.R. No. 184496, December 2, 2013, 711 SCRA 246 citing *Mattel, Inc. v. Francisco*, 582 Phil. 492, 501 (2008).

³² *Lozano v. Nograles*, 607 Phil. 334 (2009), citing *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

³³ *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014, 721 SCRA 146.

³⁴ G.R. No. 204819, April 8, 2014, 721 SCRA 146.

³⁵ G.R. No. 204819, April 8, 2014, 721 SCRA 146.

A cursory reading of the petition and petition-in-intervention reflects that this case falls within that category as grave abuse of discretion is being ascribed against the SEC in issuing MC No. 8. Section 2 of the said circular is being challenged for being in violation of the Constitution and of the letter and spirit of the final ruling in *Gamboa*. Considering the fact that MC No. 8 had already been issued by the SEC and such circular, although called merely as guidelines, carried with it a warning that failure to comply with it shall subject the juridical entity, any person, and the corporate officers responsible to sanctions provided in Section 14 of the Foreign Investments Act of 1991 (*FIA*), as amended, it is beyond doubt that the question before the Court qualifies as a justiciable controversy.

Legal Standing

As defined, *locus standi* or legal standing is the personal and substantial interest in a case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged.³⁶ The party must also demonstrate that the injury is likely to be redressed by a favorable action of the courts.³⁷ Absent this, the Court cannot consider a case. In every situation, the Court must scrutinize first whether a petitioner is suited to challenge a particular governmental act.

The petitioners' invocation of standing is based on being a citizen, lawyer, taxpayer, and additionally for petitioner Roy, a partner of a firm that patronizes PLDT for its telecommunication needs.

The SEC and PLDT claim that such justification is not enough to clothe the petitioners with legal standing because they failed to show that the implementation of the circular would cause them any direct or substantial injury. Citing *IBP v. Zamora*,³⁸ they also argue that standing cannot be based merely on being a lawyer, as membership in the Bar is too general an interest to satisfy the requirement of *locus standi*.

I find, however, that the petitioners as properly suited in their capacities as citizens.

In many cases, the legal standing of a citizen in the context of issues concerning constitutional questions was permitted by the Court. In *Imbong v. Ochoa*,³⁹ the Court stated that the citizen's standing to question the constitutionality of a law could be allowed even if they had only an indirect and general interest shared in common with the public, provided that it

³⁶ *Galicto v. Aquino III*, G.R. No. 193978, February 28, 2012, 667 SCRA 150, citing *Lozano v. Nograles*, 607 Phil. 334 (2009).

³⁷ *Anak Mindanao Party-List Group v. Exec. Sec. Ermita*, 558 Phil. 338, 351 (2007).

³⁸ 392 Phil. 618 (2000).

³⁹ G.R. No. 204819, April 8, 2014, 721 SCRA 146.

involved the assertion of a public right specifically in cases where the people themselves were regarded as the real parties-in-interest. The assertion of a public right as a predicate for challenging a supposedly illegal or unconstitutional executive or legislative action rests on the theory that a citizen represents the public in general. Although such citizen may not be as adversely affected by the action complained against as are others, it is enough that there is demonstration of entitlement to protection or relief from the Court in the vindication of a public right.⁴⁰

The collective interest of the Filipino in the compliance of the SEC, being the statutory regulator in charge of enforcing and monitoring observance with the Court's interpretation of the constitutional limits on foreign participation in public utilities, is a matter of public right. A manifest error in the implementation of what the Constitution demands, specifically in the crafting of a legal framework for corporate observance on nationality limits, lies grave abuse of discretion in its heart. This transcendently important question requires the Court to determine whether MC No. 8 conforms to the final ruling in *Gamboa*. Thus, as citizens, petitioners have the proper standing to challenge the validity and constitutionality of the assailed circular.

Substantive Issues

For the reason that Filipinos must remain in effective control of a public utility company, I am of the strong view that the Court should have partly granted the petition and declared SEC MC No. 8 as non-compliant with the final *Gamboa* ruling.

The Gamboa Decision and Resolution

Mindful of the constitutional objective of ensuring that Filipinos remain in effective control of our national economy, the Court in *Gamboa* seized the opportunity to define the term capital as read in the context of the 1987 Constitution. In deciding the issue, the Court fundamentally recognized and employed the **control test**⁴¹ as a primary method of determining compliance with the restrictions imposed by the Constitution on foreign equity participation. Under such test, one has to first look into the nationality of each stockholder as it appears in the books of the corporation because for a stockholder to have control over the shares, he must hold them as the duly registered owner in the stock and transfer book of a corporation. Thus, in *Gamboa*, the Court declared that the required Filipino control over the "capital" of a public utility meant 60% control over all shares with the right to elect the members of the board coupled with 60% control over the total

⁴⁰ *Araullo v. Aquino III*, G.R. No. 209287, July 1, 2014, 728 SCRA 1.

⁴¹ As embodied in Sec. 3 of R.A. No. 7042 or the Foreign Investments Act of 1991.

outstanding capital stock. This would ensure that effective control over a public utility would remain in the hands of Filipinos.

The Court, however, further stated that even stockholders, deprived of the right to participate in the elections of directors, could still exert effective control through the power of their vote on fundamental corporate transactions as outlined under Section 6 of the Corporation Code.⁴² For instance, stockholders, holding preferred shares, though not generally entitled to elect directors, can still exercise their undeniable right to approve or disapprove an amendment in the articles of incorporation.

Foreigners can greatly control and influence corporate decision-making processes even if they do not have legal title to the shares. Non-stockholders or persons or entities that do not have shares of a subject corporation registered under their names can remain in effective control, albeit indirectly, of those with controlling interest by just having specific property rights ("use and title") in equity given to them while the legal title of the property given to another.⁴³ Thus, in the *Gamboa Resolution* it was clarified and stressed that:

Since the constitutional requirement of at least 60 percent Filipino ownership applies not only to voting control of the corporation but also to the beneficial ownership of the corporation, it is therefore **imperative** that **such requirement apply uniformly and across the board to all classes of shares, regardless of nomenclature**

⁴² The Corporation Code, Section 6. "*Classification of shares.* – The shares of stock of stock corporations may be divided into classes or series of shares, or both, any of which classes or series of shares may have such rights, privileges or restrictions as may be stated in the articles of incorporation: *Provided*, That no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided in this Code: *Provided, further*, that there shall always be a class or series of shares which have complete voting rights.

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"Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, the holders of such shares shall nevertheless be entitled to vote on the following matters:

1. Amendment of the articles of incorporation;
2. Adoption and amendment of by-laws;
3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporation property;
4. Incurring, creating or increasing bonded indebtedness;
5. Increase or decrease of capital stock;
6. Merger or consolidation of the corporation with another corporation or other corporations;
7. Investment of corporate funds in another corporation or business in accordance with this Code; and
8. Dissolution of the corporation.

"Except as provided in the immediately preceding paragraph, the vote necessary to approve a particular corporate act as provided in this Code shall be deemed to refer only to stocks with voting rights."

⁴³ Black's Law Dictionary (2nd Pocket ed. 2001 p. 508).

and category, comprising the capital of a corporation. Under the Corporation Code, capital stock consists of all classes of shares issued to stockholders, that is, common shares as well as preferred shares, which may have different rights, privileges or restrictions as stated in the articles of incorporation.⁴⁴ [Emphases supplied]

The Court then went on to explain that “[f]ull beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60% of the voting rights, is also required.” In other words, not only should the 60% of the total outstanding capital stock and the shares with the right to elect the directors be registered in the names of Filipinos, but also the beneficial or equitable title to such shares must be *reasonably*⁴⁵ traced to Filipinos.

Thus, in *Narra Nickel Mining and Development Corp. v. Redmont Consolidated Mines Corp.*,⁴⁶ the Court stated that if doubt exists as to the extent of control and beneficial ownership in a public utility, the **grandfather rule** can be applied to supplement the control test. The purpose of the test is to make further inquiry on the ownership of the corporate stockholders.⁴⁷ By satisfying beneficial ownership test through the employment of the grandfather rule, devious yet imaginative legal strategies used to circumvent the constitutional and statutory limits on foreign equity participation can be determined.⁴⁸

⁴⁴ Resolution, *Gamboa v. Teves*, G.R. No. 176579, October 9, 2012. <<http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>> (Last visited, April 21, 2015).

⁴⁵ Resolution, *Narra Nickel Mining and Development Corp. v. Tesoro Mining and Development Inc., et. al.*, G.R. No. 195580, January 28, 2015, <<http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>> (Last visited, April 21, 2015). Parenthetically, it is advanced that the application of the Grandfather Rule is impractical as tracing the shareholdings to the point when natural persons hold rights to the stocks may very well lead to an investigation *ad infinitum*. Suffice it to say in this regard that, while the Grandfather Rule was originally intended to trace the shareholdings to the point where natural persons hold the shares, the SEC had already set up a limit as to the number of corporate layers the attribution of the nationality of the corporate shareholders may be applied.

⁴⁶ Resolution, G.R. No. 195580, January 28, 2015. <<http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>> (Last visited, April 21, 2015).

⁴⁷ Resolution, *Narra Nickel Mining and Development Corp. v. Tesoro Mining and Development Inc., et. al.*, G.R. No. 195580, January 28, 2015, <<http://sc.judiciary.gov.ph/jurisprudence/2012/october2012/176579.pdf>> (Last visited, April 21, 2015).

⁴⁸ To illustrate:

Suppose that X corporation seeks to engage as a public utility company. It divided its total outstanding capital stock of 1000 into three classes of shares – 300 common shares, 200 preferred shares with the right to vote in the election of directors (Class A preferred), and 500 preferred without such right to elect the directors (Class B preferred). Another Corporation, Y, an entity considered as a Philippine national under the FIA on the assumption that 60% of its capital is owned by Filipinos, owns all common and class B preferred shares.

Three Hundred (300) common shares in the hands of Y, a Philippine national represents sixty percent (60%) control over all shares with the right to vote in the election of directors (sum of 200 Class A preferred shares and 300 common shares). Coupled with another 500 preferred Class B shares, Y can be considered in control of eighty-percent (80%) of the total outstanding capital stock of X.

Applying the control test leads to the conclusion that a Philippine national in the person of Y controls X both with respect to the total outstanding capital stock and the sum of all shares with the right to elect the directors. However, after applying beneficial ownership test, which means looking into each stockholders

*The Assailed Circular as it
relates to Gamboa Resolution*

The petitioners strongly assert that the SEC gravely abused its discretion when it issued MC No. 8, with specific reference to Section 2, which is again quoted as follows:

Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino shall be applied to **BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.**

Roy points out that the SEC did not include in the assailed circular the requirement of applying the 60-40 rule to each and every class of shares. He fears that although Filipinos will have voting rights, they may remain deprived of the full economic benefits if the rule is not applied to all classes of shares.

I agree with the petitioners.

*The Basis of the Uniform and
Separate Application of 60:40 Rule to
Each and Every Class of Shares*

It has been said that economic rights give meaning to control. The general assumption is that control rights are always coupled with proportionate economic interest in a corporation. This proportionality gives

of Y through the grandfather rule, it would show insufficient Filipino equity of at least sixty-percent (60%) in X as required under the Constitution, Foreign Investments Act and the Court's ruling in Gamboa.

Since Y is only sixty-percent (60%) controlled by Filipinos, the Filipino Equity in X through Y would be as follows:

Sixty-percent (60%) of 300 common shares = 180 shares or 36% beneficial equity in all shares with the rights to vote in the election of directors (sum of 300 common shares and 200 Class A Preferred shares).

Sixty percent (60%) of 500 Class B preferred shares = 300 shares with the right to elect directors.

To compute total Filipino beneficial equity in the total outstanding capital stock, 300 shares plus the 180 shares as calculated above must be added. Thus, 300 shares +180 shares = 480 shares or forty eight (48%) of the total outstanding capital stock of X.

In effect, the equity of Filipinos in X, after applying the grandfather rule, has been diluted to forty-eight percent (48%) of the total outstanding capital stock and thirty-six percent (36%) of all shares with the rights to vote in the election of directors. Clearly, it violates the constitutional limitation on foreign equity participation.

stockholders theoretically an incentive to exercise voting power well, makes possible the market for corporate control and legitimates managerial property the managers do not own.⁴⁹

The same theory is adhered to by the Constitution. The words “own and control,” used to qualify the minimum Filipino participation in Section 11, Article XII of the Constitution, reflects the importance of Filipinos having both the ability to influence the corporation through voting rights and economic benefits. In other words, **full ownership up to 60% of a public utility** encompasses **both control and economic rights**, both of which must stay in Filipino hands. Filipinos, who own 60% of the **controlling interest**, must also own 60% of the **economic interest** in a public utility.

In a single class structured corporation, the proportionality required can easily be determined. In mixed class or dual structured corporations, however, there is variance in the proportion of stockholders’ controlling interest vis-à-vis their economic ownership rights. This resulting variation is recognized by the Implementing Rules and Regulation (*IRR*) of the Securities Regulation Code,⁵⁰ which defined beneficial ownership as that may exist either through voting power **and/or** through investment returns. By using and/or in defining beneficial ownership, the IRR, in effect, recognizes a possible situation where voting power is not commensurate to investment power.

Disparity in privileges accorded to different classes of shares was best illustrated in the *Gamboa Resolution*. By operation of Section 6 of the Corporation Code,⁵¹ preferred class of shares may be created with superior economic rights as compared to the other classes. Dissimilar shares, although similar in terms of number, can differ in terms of benefits. In such cases, holders of preferred shares, although constituting only a smaller portion of the total outstanding capital stock of the corporation, can have greater economic interest over those of common stockholders.

⁴⁹ *Empty Voting and Hidden Ownership: Taxonomy, Implications, and Reforms*, Henry T.C. Hu, <www.law.yale.edu/documents/pdf/cbl/PM-6-Bus-Law-Hu-Black.pdf> (Last visited, April 23, 2015).

⁵⁰ Implementing Rules and Regulations of the Securities and Regulation Code, Rule III, Sec. 1.d. Beneficial owner or beneficial ownership means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares: voting power, which includes the power to vote, or to direct the voting of, such security; and/or investment returns or power, which includes the power to dispose of, or to direct, the disposition of such security; xxx xxx xxx.

⁵¹ The Corporation Code, Section 6. *Classification of shares*. – The shares of stock of stock corporations may be divided into classes or series of shares, or both, any of which classes or series of shares may have such rights, privileges or restrictions as may be stated in the articles of incorporation: *Provided*, That no share may be deprived of voting rights except those classified and issued as “preferred” or “redeemable” shares, unless otherwise provided in this Code: xxx xxx xxx.”

In the event that a public utility corporation restructures and eventually concentrates all foreign shareholdings solely to a preferred class of shares with high yielding investment power, foreigners would, in effect, have economic interests exceeding those of the Filipinos with less economically valuable common shares. Evidently, this was not envisioned by the framers of the Constitution. And for the reasons that follow, the Court considers such a situation as an affront to the Constitution.

To begin with, it dilutes the potency of Filipino control in a public utility.

Economic rights effectively encourage the controlling stockholders to exercise their control rights in accordance with their own interest. Necessarily, if Filipino controlling stockholders have dominance over both economic ownership and control rights, their decisions on corporate matters will mean independence from external forces.

Conversely, if Filipino controlling stockholders do not have commensurate level of interest in the economic gains of a public utility, the disparity would allow foreigners to intervene in the management, operation, administration or control of the corporation through means that circumvent the limitations imposed by the Constitution. It would foster the creation of falsely simulated existence of the required Filipino equity participation, an act prohibited under Section 2 of Commonwealth Act No. 108, commonly known as the Anti-Dummy Law,⁵² effectively circumventing the *rationale* behind the constitutional limitations on foreign equity participation.

Moreover, the variation in the classes of shares would allow foreigners to acquire preferential interest and advantage in the remaining assets of the corporation after its dissolution or termination. This runs counter to the intent of the present constitution – the conservation and development of the national patrimony. Filipino stockholders should not only be entitled to the benefits generated by a public utility, they should equally have the right to receive the greater share in whatever asset that would be left should the corporation face its end.

⁵² The Anti-Dummy Law, Section 2. "In all cases in which a constitutional or legal provision requires that, in order that a corporation or association may exercise or enjoy a right, franchise or privilege, not less than a certain per centum of its capital must be owned by citizens of the Philippines or of any other specific country, it shall be unlawful to falsely simulate the existence of such minimum stock or capital as owned by such citizens, for the purpose of evading said provision. The president or managers and directors or trustees of corporations or associations convicted of a violation of this section shall be punished by imprisonment of not less than five nor more than fifteen years, and by a fine not less than the value of the right, franchise or privilege, enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos."

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Clearly **the only way** to minimize, if not totally prevent disparity of control and economic rights given to Filipinos, and to obstruct consequences not envisioned by the Constitution, **is to apply the 60-40 rule separately to each class of shares of a public utility corporation.** It results in the equalization of Filipino interests, both in terms of control and economic rights, in each and every class of shares. By making the economic rights and controlling rights of Filipinos in a public utility paramount, directors and managers would be persuaded to act in the interest of the Filipino stockholders. In turn, the Filipino stockholders would exercise their corporate ownership rights in ways that would benefit the entire Filipino people cognizant of the trust and preference accorded to them by the Constitution.

Neither an Obiter Dictum or a Treaty Violation

The respondents claim that the statement that the 60-40 rule applies to each type of shares was a mere *obiter dictum*. As reference, they point to the dispositive portions of the *Gamboa Decision* and *Gamboa Resolution*, where there is no directive that the 60-40 rule should apply to each class of shares. They insisted that the controlling rule should be what was stated in the *fallo* of the decision in *Gamboa* that the 60-40 rule applied only to shares with the right to vote in the election of directors. PSEI also cautions this Court in upholding the application of the 60-40 rule to each type of shares because it would redefine what was stated in the *Gamboa Decision*. It would also affect the obligation of the State under different treaties and executive agreements, and could disastrously affect the stock exchange market and the state of foreign investments in the country.

Again, on this point, I differ. The majority disregarded the final ruling in *Gamboa*.

Jurisprudence is replete with the doctrine "that a final and executory judgment may nonetheless be "clarified" by reference to other portions of the decision of which it forms a part; that a judgment must not be read separately but in connection with the other portions of the decision of which it forms a part. Otherwise stated, a decision should be taken as a whole and considered in its entirety to get the true meaning and intent of any particular portion thereof."⁵³ It "must be construed as a whole so as to bring all of its parts into harmony as far as this can be done by fair and reasonable interpretation and so as to give effect to every word and part, if possible, and to effectuate the obvious intention and purpose of the Court, consistent with the provisions of the organic law."⁵⁴ A final ruling in *Gamboa*, therefore,

⁵³ *La Campana Development Corp. v. Development Bank of the Phils.*, 598 Phil. 612-634 (2009).

⁵⁴ 49 C.J.S. 436, cited in *Republic v. De los Angeles*, 150-A Phil. 25-85 (1972).

includes the clarification and elucidation in the subsequent *Gamboa Resolution*, which was unquestioned until it lapsed into finality.

The claimed inconsistency in the definition of capital in the *Gamboa Decision* and *Gamboa Resolution* and on how the Court uses them in this case is more apparent than real. A deeper understanding of the Court's philosophical underpinning on the issue of capital is that capital must be construed in relation to the constitutional goal of securing the controlling interest in favor of Filipinos.

Plain from the Court's previous discussions is the conclusion that controlling interest in a public utility cannot be achieved by applying the 60-40 rule solely to shares with the right to vote in the election of directors; **it must be applied to all classes of shares.** Although applying the rule only to such shares gives an assurance that Filipinos will have control over the choice on who will manage the corporation, it does not mean that they also control the decisions that are fundamentally important to the corporation. If they would own 60% of all the shares of whatever class, they cannot be denied the right to vote on important corporate matters. To the Court, the only way by which Filipinos can be assured of having the controlling interest is to **apply the 60:40 rule to each class of shares regardless of restrictions or privileges present, with each class, being considered as a distinct but indispensable and integral part of the entire capital of a public utility for the purpose of determining the nationality restrictions under the Constitution.**

On the point of PSEI that a ruling in favor of the petitioners would lead to a violation of the obligation of the Philippines to provide fair and equitable treatment to foreign investors who have relied on the FIA and its IRR, as well as predecessor statutes, the Court believes otherwise. Basic is the rule that the Constitution is paramount above all else. It prevails not only over domestic laws, but also against treaties and executive agreements. It cannot be said either that due process and equal protection were violated. These constitutional limitations on foreign equity participation have been there all along.

Need for a Constitutional Amendment

Until the people decide, through a new constitution, to ease the restrictions on foreign participation in the public utility sector, the Court should resolve all doubts in favor of upholding the spirit and intent of the 1987 Constitution.

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As the SEC Memorandum Circular No. 8 is non-compliant with the final *Gamboa* ruling, the omission by the SEC of the 60-40 rule application in favor of Filipinos to each and every class of shares of a public utility constituted, and should have been declared, a grave abuse of discretion.

In view of all the foregoing, the petition should have been granted and SEC Memorandum Circular No. 8 should have been declared as non-compliant with the final *Gamboa* ruling.

Accordingly, the Security and Exchange Commission should have been directed to strictly comply with the final *Gamboa* ruling, by including in the assailed circular the rule on the application of the 60-40 nationality requirement to each class of shares regardless of restrictions or privileges in accordance with the foregoing disquisition.


JOSE CATRAL MENDOZA
Associate Justice